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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

GREGORY BOWMAN, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether due process requires that a defendant be permitted to collaterally attack a guilty plea entered knowingly and voluntarily pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970)?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order of the Supreme Court of Illinois (App. 1a) denying the petition for leave to appeal is reported at 204 Ill.2d 665, 792 N.E.2d 309 (2003)(Table). The opinion of the Appellate Court of Illinois (App. 2a-19a), is reported at 335 Ill. App. 3d 1142, 782 N.E.2d 333 (2002). The ruling of the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois (App. 20a-31a), is unreported.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on December 27, 2002. The Appellate Court denied the State's timely petition for rehearing on January 24, 2003. The Supreme Court of Illinois denied the State's timely petition for leave to appeal on June 4, 2003. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT

1. On April 22, 1978, fourteen-year-old Elizabeth West disappeared while walking home from a performance of a play at Belleville Township High School West. She was later found

in a rural area face down in a shallow creek. The cause of her death was strangulation, which was preceded by at least two blows to her head with a blunt object. A vaginal smear revealed moderate numbers of spermatozoa. The respondent, Gregory Bowman, confessed that he abducted West and drove her south of Belleville, where he raped her. He confessed that he struck her in the head two or three times with a piece of wood, that he strangled her, and that he dragged her body to a nearby creek, leaving her with her head in the water.

On July 7, 1978, Ruth Ann Jany disappeared from the vicinity of Belleville Bank's automated teller machine. Four months before Jany's body was found, the respondent confessed that he abducted her from a bank, raped her and strangled her, leaving the item used to accomplish the strangling around her neck. When Janey's decomposed remains were found in a wooded area south of Belleville, a knotted halter top was around her neck.

2. On September 7, 1979, an indictment was filed charging respondent with the murders of Elizabeth West and Ruth Ann Jany.

3. On October 24, 1979, in exchange for the State's agreement to waive the death penalty, respondent entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). Respondent's plea counsel advised the trial court that respondent "had indicated a willingness to plead but a non-willingness to conceed [sic] particular facts leading to that admission of guilty plea," and that "Mr. Bowman's [respondent] position is that he, in effect, is pleading guilty, desires to plead guilty." App. 35a. Respondent's counsel characterized the plea as being predicated upon *Alford*. Defendant verbally agreed to this description of his plea. App. 35a.

After the trial court gave the required admonishments, the State's Attorney presented a lengthy factual basis, by way of

witness testimony, in support of the plea. Among the evidence presented was testimony by Robert Miller, a detective with the St. Clair County Sheriff's Department. Miller related incriminating statements made by the respondent during the course of several interviews. After the State's Attorney concluded his presentation of the factual basis for the plea, the trial court found that the respondent had entered into the plea voluntarily after having knowingly and understandingly waived all his rights, including the rights to a jury trial and to confront witnesses, and that a factual basis existed for the plea. On November 30, 1979, the trial court sentenced the respondent to concurrent terms of natural life imprisonment for the murders of West and Jany. Respondent made no statement personally insisting on his innocence.

Respondent subsequently attempted to withdraw his guilty plea, predicated solely on "the propriety and legality" of the natural life sentence. After the trial court denied the motion, respondent appealed. In an unpublished order, the Illinois Appellate Court affirmed the respondent's convictions and sentences. *People v. Bowman*, 103 Ill.App.3d 1207, 435 N.E.2d 1390(1982) (Table).

4. On June 3, 1999, nearly twenty years after the guilty plea, the respondent filed a petition pursuant to the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1998)). App.20a. Respondent contended that his statements to Deputy Miller were involuntary because Miller and Danny Stark, an informant in the St. Clair County jail, had contrived a scheme to convince respondent to confess to the murders. App. 20a. In addition, respondent asserted a freestanding claim of innocence based on the newly-discovered evidence that Deputy Miller, who had by then retired, revealed the alleged scheme only recently and that the respondent was convicted largely as a result of his statements to Miller. App. 20a.

After an evidentiary hearing, the trial court entered an order granting the respondent a new trial. App. 31a. The order characterized the respondent's convictions as being the result of an *Alford* plea. The court accepted the respondent's arguments, finding that Deputy Miller's scheme constituted a type of "police overreaching" that "could result in a false confession," thus denying respondent due process. App. 30a. The trial court allowed that it might seem "incongruous" for respondent to assert a claim of innocence in view of his *Alford* plea, but concluded that respondent "cannot be held to have stipulated to what neither he nor his lawyer knew so as to bar the claim, as waived, by the plea." App. 30a.

5. The Appellate Court of Illinois affirmed. App. 2a. Despite, acknowledging that a voluntary guilty plea waives all error or irregularities that are not jurisdictional, including the admissibility of a confession, the Court decided that respondent could collaterally attack the admissibility of his confession because he had entered an *Alford* plea. App.14a. Citing this Court's *Brady* trilogy: *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Parker v. North Carolina*, 397 U.S. 790 (1970), as well as *Tollett v. Henderson*, 411 U.S. 258 (1973), the Appellate Court held that a defendant who enters an *Alford* plea does not "solemnly admit[] in open court that he is in fact guilty of the offense with which he is charged," and that therefore respondent must be allowed to launch a collateral attack on the guilty plea. App. 14a. The Appellate Court then found that the guilty plea was the result of police overreaching and a violation of due process.

6. The State sought rehearing, which the Appellate Court denied. The State then filed a petition for leave to appeal with the Supreme Court of Illinois, which also was denied. App. 1a.

REASONS FOR GRANTING THE PETITION

Despite recognizing that a defendant's voluntary and intelligent guilty plea forecloses a collateral attack on his conviction, the Appellate Court interpreted this Court's precedents as creating a federal due process right to collaterally attack a guilty plea if the plea was entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). The Appellate Court's analysis rests upon a single line in *Tollett*, 411 U.S. at 267, stating that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Because *Alford* permits a defendant to plead guilty without otherwise endorsing the factual basis of the conviction, the Appellate Court concluded that such pleas do not involve a "solemn admission" of guilt. Given this premise, the Court held that an *Alford* plea is sufficiently distinct from ordinary guilty pleas that, as a matter of federal due process, a defendant has a right to collaterally attack an *Alford* plea based on alleged violations antecedent to the plea.

This Court should grant review because the decision below creates a conflict with courts of last resort from other states, which have held that defendants do not have a right to attack *Alford* pleas in collateral proceedings. See Section A, *infra*. Moreover, the decision below is wrong, for it misinterprets this Court's precedents as requiring states to allow convicted defendants to collaterally attack their *Alford* pleas. See Section B, *infra*. Finally, if allowed to stand, the Illinois court's decision will create mischief in the administration of criminal law, as defendants pleading guilty will invariably attempt to do so under *Alford* in order to retain the ability, at some future date, to collaterally attack their pleas.

A. The Illinois Appellate Court's Decision Creates A Split Of Authority Among State Courts.

The Illinois court's ruling, that defendants have the right to collaterally attack a knowing and voluntary *Alford* plea conflicts with decisions rendered by courts in several other states.[1] These other courts correctly concluded that an *Alford* plea is still a guilty plea and that defendants have no right to collaterally attack such pleas.

The Supreme Court of Rhode Island held:

> Although in the case at bar, Armenakes has insisted that he understood that an *Alford* plea served to preserve his innocence, we are satisfied that applicant simply elected an alternate and more comfortable means to dispose of a felony charge....Therefore, we conclude that Armenakes may have maintained his innocence, but he was nevertheless convicted of the crime charged and is bound by the terms of the plea.

Armenakes v. Rhode Island, 821 A.2d 239 (R.I. 2003) The Iowa Supreme Court likewise held that an *Alford* plea waives all defenses and objections, and foreclosed challenges to the defendant's claimed constitutional violations of the statute of limitations and speedy trial. *State v. Burgess*, 639 N.W.2d 564, 566 (Ia. 2002). The New York Court of Appeals reached the

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[1] It is settled that the knowing and voluntary nature of the plea can be attacked. *United States v. Broce,* 488 U.S. 563, 569 (1989) "[w]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary....[and] if the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack"). The question here presents other challenges to an *Alford* plea.

same conclusion in *People v. Green,* 553 N.E.2d 1331 (N.Y. 1990), *cert. den.,* 498 U.S. 860 (1990), ruling that the discriminatory exercise of peremptory challenges during the jury selection that preceded defendant's *Alford* plea was waived once that plea was entered. A guilty plea, the New York court explained, "marks the end of a criminal case, not a gateway to further litigation."*Id.* at 1332. The Supreme Court of Connecticut concurred, *State v. Niblack,* 596 A.2d 407 (Conn. 1991) (challenge to in personam jurisdiction), as did the Supreme Court of Wisconsin *State v. Bangert,* 389 N.W.2d 12 (Wisc.1986)(venue challenge).

This Court has yet to squarely address whether the prohibition against collaterally attacking a guilty plea, as stated in the *Brady* trilogy and *Tollett,*does not apply to *Alford* pleas. Because *Alford* pleas are still pleas that involve a solemn admission of guilt, the foregoing question should receive an affirmative answer. Yet, the Illinois court has now effectively held, as matter of federal due process and in conflict with the decisions of other state courts, that a defendant who enters an *Alford* plea can pursue any collateral attack on the plea. This Court should take this opportunity to resolve the conflict.

B. The Illinois Appellate Court Erroneously Carved A Distinction Between *Alford* Pleas And Other Guilty Pleas.

Far from supporting the Illinois Appellate Court's analysis, *Tollett* and the *Brady* trilogy make clear that an *Alford* plea, like any guilty plea, precludes collateral attacks predicated on events antecedent the plea. This Court has never suggested that due process requires an *Alford* plea to be treated differently with respect to collateral attacks. Accordingly, the Illinois Appellate Court's holding, that due process imposes such a requirement, is baseless. This Court should grant this petition, and definitively declare that even those defendants who enter an *Alford*

plea are precluded from collaterally attacking their convictions where the plea is knowingly and voluntarily entered.

This Court has repeatedly held that a defendant is foreclosed from challenging his conviction following a guilty plea, provided that the guilty plea was knowingly and voluntarily entered. The principal authority for this proposition lies in what has been called the *Brady* trilogy: *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Parker v. North Carolina*, 397 U.S. 790 (1970)

In *Brady*, the defendant pled guilty to a charge of kidnaping after discovering that a co-defendant would testify against him. After being carefully examined about the voluntariness of his plea, the court sentenced defendant to 50 years' imprisonment. *Brady*, 397 U.S. at 743. The defendant sought post-conviction relief, claiming that his plea was involuntary because the potential death sentence then associated with a kidnaping charge effectively coerced his plea. *Id.* This Court refused to consider the defendant's plea involuntary:

> *That a plea is a grave and solemn act to be accepted only with care and discernment has long been recognized.* Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so - hence, the minimum requirement that his plea be the voluntary expression of his own choice. *But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or a judge.* Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent

> acts done with sufficient awareness of the relevant circumstances and likely consequences.

Id. (emphasis added).

Following *Brady*, this Court has consistently considered the plea itself to be the grave and solemn act of admission of guilt. In *McMann*, the defendant challenged his guilty plea to second-degree robbery, claiming that his plea was the product of a coerced confession. 397 U.S. at 761. This Court rejected defendant's argument. Recognizing the importance of the finality of guilty plea convictions, this Court considered defendant's guilty plea to have forfeited his right to challenge the confession where counsel reasonably advised that a challenge to the confession would not have been successful. *Id.* And, in *Parker*, this Court held that the defendant's guilty plea precluded a challenge that members of the defendant's race had been systematically excluded from the grand jury. 397 U.S. at 799. The defendant's guilty plea also precluded a challenge to the defendant's confession. *Id.* at 796-97.

The Illinois Appellate Court acknowledged the *Brady* trilogy and its relationship to the facts in the instant case. It also recognized that in *Tollett*, *supra,* a defendant's challenge to a constitutional violation that occurs prior to a plea is forfeited by the act of the guilty plea, even if the basis for the constitutional challenge is unknown to the defendant at the time of the plea. 411 U.S. at 266. Adhering to the principles announced in *Brady*, *Tollett* held:

> We thus affirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitu-

> tional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

Id. at 267.

Absent from *Tollett*, *Brady*, *McMann* and *Parker* is any indication that the solemn admission in open court of guilt is anything other than the *plea of guilty itself,* which forecloses challenges to matters antecedent to the guilty plea. The Illinois Appellate Court's decision to carve out an exception for *Alford* pleas finds no footing in the decisions of this Court's jurisprudence. Nowhere has this Court stated that the solemn admission of guilt, as part of the guilty plea process, requires an expressed unqualified admission to the elements comprising the offense. Rather, the solemn act is the knowing and voluntary *act* of pleading guilty, which is often motivated by considerations far removed from a humble concession that the act was indeed committed. In *Brady*, this Court addressed the multiple factors that play into an accused's decision to plead guilty:

> The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. *In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family.* All of these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than

> is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

397 U.S. at 750 (emphasis added).

Accordingly, this Court has never held that a defendant waives all future challenges to events antecedent to the guilty plea *only* where the defendant, in addition to pleading guilty, confesses to the evidentiary facts constituting the offense. Rather, the admission of guilt is embodied by the formal act of *pleading* guilty, irrespective of the factors motivating that act. In the present case, the respondent's knowing and intelligent act of pleading guilty was the solemn act that should have precluded his collateral challenge to the voluntariness of his confession.

In *United States v. Mackins*, 218 F.3d 263 (3rd Cir. 2000), the Third Circuit considered the question of whether an earlier *Alford* plea could be considered as a prior conviction for purposes of sentencing calculation under U.S.S.G. § 4A1.1. *Id.* 265. The defendant argued on appeal that only when a defendant acknowledges factual guilt or is found guilty following a trial is there an adjudication of guilt for purposes of calculating criminal history, and that an *Alford* plea lacks the factual basis to conclude that a defendant is guilty of the offense. *Id.* at 266-67. The Third Circuit disagreed, holding that, under *Alford*, once a factual basis for guilt is established, the fact that the defendant may continue to proclaim his innocence does not negate the legal conclusion that he is guilty. *Id.* at 268. In this holding, the court refused to find an *Alford* plea distinguishable from any other type of guilty plea:

> As we have, hopefully, satisfactorily explained, an *Alford* plea is simply a guilty plea, with evidence in the record of guilt, typically accompanied by the defendant's protestation of innocence and his or her unequiv-

> ocal desire to enter the plea . . . That the defendant asserts his or her innocence, however, does not change the fact that he or she ultimately enters a guilty plea. Thus, as the government succinctly states, "there is no such thing [as an *Alford* disposition], at least not separate and distinct from a plea of guilty.

Id. at 268.

The Illinois Appellate Court went astray in ruling that an *Alford* plea constitutes a separate class of guilty plea whereby a defendant, as a matter of due process, reserves the right to challenge events antecedent to the plea. As such, the Illinois court placed *Alford* pleas in a separate class of favored pleas that process insulates from the waiver rule articulated in the *Brady* trilogy and *Tollett*. As shown above, there is no basis in either *Tollett* or the *Brady* trilogy for making this distinction. Furthermore, *Alford* pleas are, despite the defendant's protestations of innocence, still guilty pleas and thereby acquire the same degree of finality as any other guilty plea.

Alford itself supports this view. In *Alford*, the defendant, facing a potential death penalty, elected to plead guilty to a lesser charge of second-degree murder. The court heard sworn testimony from a police officer who summarized the State's case. 400 U.S. at 28. The defendant advised the court that he did not commit the murder but that the specter of the death penalty propelled his decision to plead guilty nonetheless. *Id.* at 28. During post-conviction proceedings, the defendant contended that his plea of guilty was invalid because it was a product of fear and coercion. *Id.* at 29.

The Fourth Circuit agreed, but this Court reversed. *Id.* at 30-31. Concerned with the defendant's protestations of innocence, this Court observed that a typical plea of guilty is justified by the defendant's admission to the commission of the crime, such that the plea subsumes the elements even if there is no express

admission by the defendant that he committed the particular acts alleged in the indictment. *Id.* at 31. However, this Court refused to find a guilty plea accompanied by vocal protestations of innocence invalid, because while most pleas consist of both a waiver of trial *and* an express admission of guilt, the latter aspect of the guilty plea is not a constitutional prerequisite to the imposition of a criminal penalty. *Id.* at 37. Accordingly, the constitutionally relevant premise in a guilty plea is that it was voluntarily, knowingly, and understandingly made, despite the motivations that drove the plea. *Id.* at 37.

Contrary to the holding of the Illinois Appellate Court, an *Alford* plea is no less a solemn act of pleading guilty than the pleas entered in *Tollett* and the *Brady* trilogy. *Alford* simply crystalized the reality (otherwise alluded to in *Brady)* that a plea knowingly and voluntarily made should be accepted notwithstanding a protestation of innocence, because it is often the case that a defendant plead for reasons other than willingness to concede the commission of the elements of the offense. Accordingly, the fact that respondent here entered into an *Alford* plea - even though respondent did not personally protest his innocence as did Alford - means that respondent did indeed enter a solemn admission of guilt, the *knowing* and *voluntary* act of pleading guilty, even though he did not engage in the constitutionally dispensable act of separately acknowledging the commission of the acts alleged in the charging instrument.

Accordingly, the Illinois Appellate Court misconstrued this Court's precedents in finding that an *Alford* plea is not a solemn admission of guilt. It further misconstrued precedent, and departed from decisions rendered by the courts of other states, in finding that an *Alford* plea, as a matter of due process, operates as a conditional guilty plea and preserves the convicted defendant's right to challenge any and all events antecedent the guilty plea. This Court should grant review and reverse.

C. If The Illinois Appellate Court's Decision Stands, All Defendants Pleading Guilty Will Enter *Alford* Pleas And There Will Be No Finality In Guilty Plea Convictions.

The rule underlying the Illinois court's published decision, if adopted widely, would have drastic and mischievous consequences for the administration of criminal law. For example, under Federal Rule of Criminal Procedure 11(a)(2), federal defendants may attack specifically preserved issues raised at the time of the guilty plea in what are known as "conditional" guilty pleas. Conversely, "unconditional" guilty pleas are immune from collateral attack on bases antecedent to the guilty plea. Fed. R. Crim. P. 11(a)(2); *see also United States v. Floyd*, 108 F.3d 202, 204 (9th Cir. 1997); *United States v. Bahhur*, 200 F.3d 917, 923 (6th Cir. 2000); *United States v. Valdez-Santana*, 279 F.3d 143, 145 (1st Cir. 2003). If, as the court below held, an *Alford* plea may be collaterally attacked based upon antecedent facts and circumstances, then Rule 11(a)(2), which gives defendant the right to preserve a specific issue on a plea of guilty, would be entirely superfluous. After all, a defendant could merely enter an *Alford* plea and, under the Illinois court's strained analysis, have a right to raise any and all issues relating to antecedent proceedings *even if* they were never specifically raised or preserved at the time of the plea.

Given the foregoing, one would have to question why any defendant pleading guilty would ever enter anything but an *Alford* plea. The negative consequences of the Illinois court's decision are self-evident. Far from promoting the goal of finality of convictions, (*see Blackledge v. Allison*, 431 U.S. 63, 71 (1977)), defendants will routinely enter *Alford* pleas with the expectation that, at some point in the future, they could raise collateral challenges to the conviction on grounds known or unknown at the time the plea was entered. The practical effect

would be the nullification of the concept of the guilty plea itself, with defendants sparing themselves a trial and securing a favorable disposition in exchange for the plea, while reserving the right to seek review of any and all issues antecedent to the guilty plea. *Alford* would become the exception that swallowed the rule, with a devastating effect on the finality of convictions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2003

APPENDIX

IN THE SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner,

v.

GREGORY BOWMAN, Respondent.

No. _____

The petition for leave to appeal is denied.

IN THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant,

v.

GREGORY BOWMAN, Defendant-Appellee.

No. 5-01-0340

Dec. 27, 2002.

Presiding Justice HOPKINS delivered the opinion of the court:

Gregory Bowman (defendant) was convicted in 1979 for the murders of two young women. Twenty years later, a newspaper article alleged a previously unknown collaboration between the detective to whom defendant confessed and a cellblock mate of defendant's during the time of his confession. Defendant filed a postconviction petition asserting that the new information rendered his confession coerced and his constitutional rights violated. After a hearing on defendant's postconviction petition, the trial court granted defendant a new trial. During the proceedings, the trial court imposed sanctions against the St. Clair County State's Attorney's office, to reimburse defendant for his expenses in responding to motions filed by the State.

The State appeals the trial court's order granting defendant a new trial and the trial court's order imposing sanctions. The State asserts, *inter alia,* that the trial court erred in ordering a new trial, because the evidence indicated no police scheme to coerce defendant's confession, and that the trial court abused its discretion in imposing sanctions. We affirm.

FACTS

Background

On September 7, 1979, defendant was charged by indictment with the murders of Elizabeth West and Ruth Ann Jany. At a hearing on October 24, 1979, defendant waived his right to a trial by a jury, in exchange for the State's waiving its plea for a death sentence. At the hearing, defendant's counsel indicated that defendant was entering his plea as provided by *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and that defendant indicated a willingness to plead guilty but a nonwillingness to concede facts admitting his guilt. Defendant's counsel stated, "[Defendant], in effect, is pleading guilty [--] desires to plead guilty." Defendant agreed with his counsel's statement, and the trial court admonished defendant as required by Supreme Court Rule 402 (158 Ill.2d R. 402) for a criminal defendant who pleads guilty.

Thereafter, the State presented a factual basis for defendant's guilty plea, including the testimony of deputy sheriff Robert Miller, who described defendant's confessions to the abductions and murders of Elizabeth West and Ruth Ann Jany. The State presented evidence corroborating defendant's confession to the murder of Elizabeth West: Elizabeth disappeared at approximately 11:15 p.m. on April 22, 1978, after walking home from a play at Belleville Township High School West; when Elizabeth's body was discovered, it was lying face down in a wooded creek and it was fully clothed, except for a missing bra strap; and Elizabeth had been sexually assaulted, struck twice on the head with a blunt object, and then strangled to death. The State also presented evidence that, on the night of Elizabeth's disappearance, Judy Barnum had refused defendant's invitation to attend a play at either Belleville Township High School West or the Muny Opera.

Likewise, the State presented evidence corroborating defendant's confession to the murder of Ruth Ann Jany: Ruth Ann was abducted on July 7, 1978, at approximately 11:30 p.m. from a First National Bank automated teller machine located in downtown Belleville; at the time of her disappearance Ruth Ann did not have her purse in her possession; after Ruth Ann disappeared, a number of successful and unsuccessful attempts were made to withdraw money from her checking account via her automated teller machine card and a total of $330 was successfully withdrawn; and when Ruth Ann's body was discovered in a rural area south of Belleville, approximately 20 feet from a farmer's road and 400 feet from the county line, it was not buried, was fully dressed, and had around the neck a halter top with a knot. The State further produced evidence that both defendant and Ruth Ann had accounts with, and automated teller machine cards for, the First National Bank of Belleville and that, at the time of Ruth Ann's disappearance, defendant was spending an unusual abundance of cash. Defendant's corroborated admissions regarding the murder of Ruth Ann and the location of her body were made prior to the discovery of her body.

The trial court concluded that defendant was entering his plea voluntarily, after having knowingly and understandingly waived his rights, and that a factual basis existed for the plea. Defendant was sentenced on November 30, 1979, to two concurrent terms of natural-life imprisonment.

On January 7, 1980, the trial court denied defendant's motion to withdraw his guilty plea. Defendant appealed his sentence only, and in an order entered pursuant Supreme Court Rule 23 (73 Ill.2d R. 23), on February 25, 1982, this court affirmed defendant's sentences. *People v. Bowman,* 103 Ill.App.3d 1207, 62 Ill.Dec. 418, 435 N.E.2d 1390 (1982) (unpublished Rule 23 order).

On June 3, 1999, almost 20 years later, defendant filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1998)). Defendant alleged that his statements to deputy sheriff Robert Miller were involuntary because defendant had recently learned from an article published in the St. Louis Post Dispatch that Deputy Miller and Danny Stark had contrived a scheme to acquire defendant's confession, thereby creating circumstances bespeaking fraud, trickery, deceit, and coercion and that, thus, they had violated defendant's constitutional rights.

On November 28, 2000, at the postconviction hearing held before the Honorable Richard Aguirre, the following evidence was adduced.

Defendant testified that while he was incarcerated in the county jail, after his sentencing in an unrelated case and while awaiting his return to Menard Correctional Center (Menard), in which he had previously spent four years, defendant met Danny Stark, a cellblock mate. Defendant stated that he revealed to Stark that defendant was terrified of returning to Menard and that Stark thereafter orchestrated a plan to bond out of jail, return to jail, and help defendant escape. Defendant testified that in order to circumvent the weekly transfers to Menard until Stark returned to free defendant, he threw himself from the top bunk of the cell and was taken to the hospital. Defendant testified that he thereafter accepted Stark's suggestion that defendant make a statement regarding the Elizabeth West and Ruth Ann Jany murders, about which defendant previously had been questioned after his arrest in the unrelated case. According to the escape scheme, defendant could remain in the county jail while the police investigated his statements, avoiding a transfer to Menard, until Stark was released and could return to free defendant. Defendant explained that his attorney had provided him with newspaper articles and police reports and that police officers had, while questioning defendant

previously concerning the murders, also revealed police reports to defendant. Defendant testified that from this information, he and Stark created "a believable story." Defendant testified that he never believed that his statements would be used against him because he had an alibi during the murders and he understood that the investigators had corroborated the alibi.

Defendant testified that after he requested to speak with an investigator, deputy sheriff Robert Miller arrived to interview him. Defendant stated that during the interrogations, Deputy Miller suggested the answers to the questions he had asked defendant. Defendant told Deputy Miller that he would provide a written statement on the following Sunday, the day after the day defendant expected to escape with Stark. Stark was released, but on Sunday, after Stark failed to appear at the jail on Saturday, defendant recanted his confession. Defendant stated that he had been unaware of the collusion between Deputy Miller and Stark until the St. Louis Post-Dispatch published an article stating that Deputy Miller had admitted tricking defendant into confessing by recruiting Stark to convince defendant that Stark would assist in defendant's escape and keep defendant from returning to Menard.

Carolyn Tuft, a St. Louis Post Dispatch investigative reporter, testified that she had interviewed Deputy Miller in February 1999. Tuft stated that during the interview, Deputy Miller indicated that he had placed Stark, a "con artist," in a cell with defendant and had told Stark to convince defendant that if defendant discussed the murders, defendant would avoid a transfer to Menard and stay in the county jail long enough for Stark to be released from jail, to return, and to assist in defendant's escape.

Bill Smith, also a St. Louis Post Dispatch reporter, accompanied Tuft during her interview with Deputy Miller. He testified that during the interview Deputy Miller had referred

to his knowledge of defendant's fear of returning to Menard. Smith testified that during the interview with Deputy Miller, Deputy Miller had conveyed the idea that it was his plan to obtain information from defendant through the escape scheme.

Danny Stark testified that prior to the underlying incident, he had worked as an informant for Deputy Miller. Stark testified that Deputy Miller did not place him in defendant's cellblock with the intent of promoting the escape scheme to obtain defendant's confession. Stark stated that while he was in the cellblock with defendant, defendant indicated his involvement with the disappearances of Ruth Ann Jany and Elizabeth West. Stark stated that because it was the right thing to do, he notified Deputy Miller that defendant was implicating himself in the murders. He testified that Deputy Miller told Stark to keep his ears open.

Stark explained that he and defendant, not Deputy Miller, concocted the escape plan and that it was common for inmates to discuss escaping. Stark testified that he had not reviewed information from the newspapers and had not discussed with defendant how to obtain additional information about the murders. Stark admitted, however, that he utilized defendant's intense fear of returning to Menard to promote the escape plan and that he might have relayed defendant's fear to Deputy Miller.

On March 21, 1979, the same day that defendant gave his first taped statement to Deputy Miller, the State's Attorney agreed to a bond reduction for Stark, and he was released. Stark asserted that although his charge at the time of defendant's confession was ultimately reduced to misdemeanor theft, that was based on a theory of Stark's accountability for the theft and was not based on the assistance Stark gave Deputy Miller in defendant's case.

Deputy Miller testified that he did not place Stark in the cellblock with defendant and that he did not propose the escape plan. Deputy Miller also denied that he conveyed the idea to Tuft and Smith that he had contrived the escape scheme between Stark and defendant to obtain defendant's confession.

Deputy Miller testified that he had utilized Stark as an informant approximately four to six times prior to defendant's case. Deputy Miller testified that in return for Stark's previous assistance, Deputy Miller would thereafter "[c]atch him speeding, let him go, give him a warning ticket." Deputy Miller stated that on March 10, 1979, Stark approached him with defendant's admissions and that he encouraged Stark to continue talking with defendant. Deputy Miller admitted that he may have told Stark to convince defendant that if defendant discussed the murders, defendant could stay in the county jail.

Deputy Miller testified that before speaking with defendant, he reviewed the July 28, 1978, report or spoke with investigator David Gravot regarding Investigator Gravot's interrogation of defendant concerning the abduction and murder of Elizabeth West, in which defendant invoked his fifth amendment right to counsel and referred all questions to his attorney. Deputy Miller thereafter reread defendant his *Miranda* rights (*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)) before speaking with him. Deputy Miller explained that he had given details to defendant during his interview, *i.e.,* that Elizabeth West's bra was missing, to persuade defendant to continue his statements.

Deputy Miller testified that he was unaware of defendant's intense fear of returning to Menard but was aware that as a means of acquiring information from defendant, Stark was telling defendant that he would assist in defendant's escape. Deputy Miller explained that he did not note the escape plan in his police reports because he did not believe that an escape

would occur. Deputy Miller stated that during his and defendant's fourth and last conversation, on Sunday, March 25, 1979, after defendant was to escape on Saturday with the assistance of Stark, who had been released from jail on Wednesday, March 21, 1979, defendant recanted his confession.

Deputy Miller testified that in exchange for Stark's assistance in defendant's case, Deputy Miller probably attempted to obtain leniency through the State's Attorney's office regarding Stark's pending theft charges.

On April 12, 2001, the trial court found that defendant had pleaded guilty in 1979 in accordance with *Alford*. In its order, the trial court also made the following pertinent factual findings:

(1) On March 10, 1979, while defendant remained in the county jail awaiting transport to Menard for his conviction concerning an unrelated abduction, Stark approached Deputy Miller to inform him that defendant had made statements implicating himself in the abduction and murder of Elizabeth West.

(2) On March 20, 1979, defendant told jailers he wanted to talk to a detective. Miller appeared, obtained a waiver of defendant's constitutional rights, and conducted an oral interview during which defendant admitted the abduction, assault, and murder of Elizabeth West. He promised a future written statement and to take Deputy Miller to Ruth Ann Jany's body, yet unfound.

(3) On March 21, 22, and 25, 1979, defendant implicated himself in both murders, promising to lead Deputy Miller to Ruth Ann Jany's body on Sunday, all for the purpose of delaying his departure for Menard so that Stark could make bail and return to help defendant escape, and Deputy Miller,

feigning ignorance of the escape plan, pressured defendant to lead Deputy Miller to Ruth Ann Jany's body to justify delaying defendant's transfer to Menard.

(3) Stark's bond was reduced, at the request of an assistant State's Attorney, to $500 cash, and on March 21, 1979, Stark posted bail and was released at 6:40 p.m., soon after the first recorded interview with defendant.

(4) When the escape did not materialize, defendant recanted his prior statements, without revealing the escape plan to Deputy Miller.

The trial court held that the unusual facts of this case, including the escape scheme orchestrated through Stark's agency relationship with Deputy Miller, amounted to a type of police overreaching that could result in a false confession, that defendant's incriminating statements to Deputy Miller were involuntary, and that defendant is entitled to a new trial.

Sanctions

Prior to the postconviction hearing, in an order filed September 28, 1999, the trial court, over the State's objection, granted defendant's motion for discovery. On October 12, 1999, the State filed a motion to vacate the order granting defendant's motion for discovery, and the State also filed a petition to transfer the postconviction proceedings to the trial judge who had presided over defendant's plea proceedings in 1979.

On November 3, 1999, the State filed a motion for substitution of judge for cause, explaining why Judge Roger Scrivner was under a conflict of interest, was biased in favor of defendant, and was prejudiced against the State. On November 15, 1999, Judge Scrivner denied the State's motion to substitute judge, ordered that all evidence and police reports be produced to defendant, and ordered a deposition of Deputy Miller. The

State filed a motion in the supreme court for a supervisory order directing Judge Scrivner to vacate his order of November 15 and to transfer the cause to another judge for a hearing on the motion to substitute. On December 21, 1999, the supreme court entered an order denying the motion for a supervisory order.

On February 23, 2000, defendant filed a motion seeking attorney fees for responding to the motions by the State. On June 15, 2000, Judge Scrivner entered an order wherein he found that the State's conduct in filing the motion to transfer to the original trial judge and the motion to vacate the order for discovery, while never requesting a hearing, thereby abandoned said issues and caused defendant's attorney a great waste of time and effort. Judge Scrivner also imposed sanctions in accordance with Supreme Court Rule 137 (155 Ill.2d R. 137), because the motion for substitution of judge for cause was not well founded in fact or warranted by existing law and because the motions were filed to unnecessarily delay the proceedings and increase the cost of litigation for defendant. Judge Scrivner ordered the State's Attorney's office to pay attorney fees to defendant's attorneys in the total amount of $1,950.

On July 7, 2000, the State filed a motion to vacate the order granting sanctions, and on August 25, 2000, Judge Scrivner denied the State's motion. The State filed its timely appeal.

ANALYSIS

New Trial

Initially, defendant contends that he did not enter an *Alford* plea, *i.e.*, that the trial court had rejected his *Alford* plea, and that therefore he was subjected to a trial. We disagree.

At the guilty plea proceeding, defendant's counsel stated that although defendant was unwilling to concede facts

admitting his guilt, defendant was in effect entering a guilty plea. The court admonished defendant in accordance with a guilty plea proceeding, *i.e.*, explained to defendant that he was waiving his right to a trial by jury and his right to cross-examine. The State presented evidence to establish the factual basis for the guilty plea, in compliance with *Alford*. See *Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (although Alford stated that he had not committed the crime, the guilty plea was deemed valid where Alford entered his plea of guilty and the State presented a sufficient factual basis for the plea). The trial court, after recognizing that defendant had waived his right to a trial by jury in exchange for the State's waiver of its right to seek a death sentence, stated that it would proceed in the fashion of a bench trial, without evidence being presented by defendant or cross-examination by defendant. The trial court stated, "[I]n effect * * * the [d]efendant * * * would be pleading to the case." The court asked defendant if he, in effect, desired to plead guilty, and defendant answered in the affirmative. The State then presented lengthy evidence, by way of witnesses and stipulations, designed to satisfy the requirement in *Alford* that a strong factual basis be presented when a defendant wishes to plead guilty while maintaining his innocence. Defendant entered an *Alford* plea and was not subjected to a trial.

Although neither the State nor defendant addresses how the ramifications of defendant's *Alford* plea relate to defendant's contentions concerning his coerced confession, we refuse to proceed with our analysis as if defendant's confession had been offered into evidence at a trial. See *McMann v. Richardson*, 397 U.S. 759, 773, 90 S.Ct. 1441, 1447-49, 25 L.Ed.2d 763, 775 (1970).

In Illinois, a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional. *People v. Peeples*, 155 Ill.2d 422, 490, 186 Ill.Dec. 341, 616 N.E.2d 294 (1993).

"Issues waived by a defendant's plea of guilty include the admissibility of his or her confession." *Peeples,* 155 Ill.2d at 491, 186 Ill.Dec. 341, 616 N.E.2d 294.

The Supreme Court has expressly held that a defendant's relinquishment of his right to challenge a confession is a valid bargaining point in plea negotiations. *McMann,* 397 U.S. at 768-71, 90 S.Ct. at 1447-49, 25 L.Ed.2d at 771-74; *People v. Stice,* 160 Ill.App.3d 132, 139, 112 Ill.Dec. 49, 513 N.E.2d 463 (1987). In *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), *McMann,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763, and *Parker v. North Carolina,* 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970), the Court dealt at length with the effect of a plea of guilty on the later assertion of constitutional right violations.

Although in each case the Supreme Court refused to subject the defendant's plea of guilty to collateral attack on the ground that it was motivated by a constitutional violation prior to the guilty plea, *i.e.,* a coerced confession, we find the Supreme Court's analyses to be instructive. In *Brady,* the Court explained, "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Brady,* 397 U.S. at 748, 90 S.Ct. at 1468, 25 L.Ed.2d at 756. The Court in *Tollett* explained that even if the circumstances relating to the constitutional violation were unknown at the time of the guilty plea, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235, 243 (1973).

In the present case, unlike *Brady, McMann, Parker,* and *Tollett,* defendant did not solemnly admit in open court that he was in fact guilty of the offense with which he was charged. We therefore hold that if a defendant enters a guilty plea but maintains his innocence of the crime, as permitted by *Alford,* and the State's factual basis for the defendant's plea primarily concerns a confession, of which facts unknown at the time of the defendant's plea suggest coercion, the defendant may collaterally attack his guilty plea.

Accordingly, we now review defendant's claim that the St. Louis Post Dispatch article in February 1999 alerted him to a previously unknown scheme between Deputy Miller and Stark to obtain defendant's confession and that the scheme rendered his confession involuntary.

In reviewing whether defendant's confession was voluntary, we must accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence. *In re G.O.,* 191 Ill.2d 37, 50, 245 Ill.Dec. 269, 727 N.E.2d 1003 (2000). We review *de novo* the ultimate question of whether the confession was voluntary. *In re G.O.,* 191 Ill.2d at 50, 245 Ill.Dec. 269, 727 N.E.2d 1003. In determining whether a statement has been voluntarily given, we must consider the totality of the circumstances. *People v. Martin,* 102 Ill.2d 412, 426-27, 80 Ill.Dec. 776, 466 N.E.2d 228 (1984).

Certain interrogation tactics, in isolation or as applied to the unique characteristics of a suspect, are so offensive to a civilized system of justice that they must be condemned. *People v. Manning,* 182 Ill.2d 193, 208, 230 Ill.Dec. 933, 695 N.E.2d 423 (1998). To determine if defendant's confession was voluntary, we must focus on the crucial element of police overreaching. *Manning,* 182 Ill.2d at 208, 230 Ill.Dec. 933, 695 N.E.2d 423.

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York,* 360 U.S. 315, 320-21, 79 S.Ct. 1202, 1205- 06, 3 L.Ed.2d 1265, 1270 (1959).

A defendant's confession will be considered involuntary when the defendant's will was overborne at the time of his confession so that the confession cannot be deemed the product of a rational intellect and a free will. *People v. Foster,* 168 Ill.2d 465, 476, 214 Ill.Dec. 244, 660 N.E.2d 951 (1995). "[P]olice are allowed to play on a suspect's ignorance, fears [,] and anxieties so long as they do not magnify these emotionally charged matters to the point where a rational decision becomes impossible." See *United States v. Rutledge,* 900 F.2d 1127, 1130 (7th Cir.1990).

The State may not extort confessions by deliberate fraud or trickery. *People v. Smith,* 108 Ill.App.2d 172, 180, 246 N.E.2d 689 (1969). Evidence that the accused was threatened, tricked, or cajoled into the waiver of his rights will, of course, show that the defendant did not voluntarily waive his privilege against self-incrimination. *Smith,* 108 Ill.App.2d at 179, 246 N.E.2d 689; see also *Miranda v. Arizona,* 384 U.S. 436, 476, 86 S.Ct. 1602, 1629, 16 L.Ed.2d 694, 725 (1966). " 'Trickery' involves affirmative acts of fraud or deceit." *Smith,* 108 Ill.App.2d at 179, 246 N.E.2d 689. The confession must not result from deceptive interrogation tactics calculated to overcome the defendant's free will. *United States v. Kontny,* 238 F.3d 815, 818 (7th Cir.2001).

In *Spano,* the defendant had contacted a close childhood friend who was a recruit at the police academy, and the defendant implicated himself in the murder for which he was indicted. *Spano,* 360 U.S. at 317, 79 S.Ct. at 1204, 3 L.Ed.2d at 1268. Bruno, the childhood friend, contacted his superiors with the information, and officials requested that Bruno falsely convey to the defendant that the defendant's contact had placed Bruno's job in jeopardy and that the loss of his job would be disastrous to his wife, his children, and his unborn child. *Spano,* 360 U.S. at 319, 79 S.Ct. at 1204- 05, 3 L.Ed.2d at 1269. After four sessions playing on the defendant's sympathies, the defendant succumbed to his friend's prevarications and agreed to make a statement to officials. *Spano,* 360 U.S. at 319, 79 S.Ct. at 1205, 3 L.Ed.2d at 1269. The court, considering the totality of the circumstances, held that the defendant's will was overborne by "official pressure, fatigue [,] and sympathy falsely aroused." *Spano,* 360 U.S. at 323, 79 S.Ct. at 1207, 3 L.Ed.2d at 1272.

In the present case, the trial court found that with the knowledge of defendant's previous assertion of his right to remain silent, Deputy Miller collaborated with Stark to obtain defendant's confession to the underlying murders. Stark and defendant contrived the escape scheme, and in reliance on the escape scheme, defendant and Deputy Miller each "essayed strategic deception on the other": defendant making admissions, promising to lead Deputy Miller to the location of Ruth Ann Jany's body on Sunday, and delaying his departure for Menard so that Stark could make bail and return to help defendant escape on Saturday; and Miller feigning ignorance of the escape plan and asking to be led to Ruth Ann Jany's body to justify delaying defendant's transfer to Menard, of which defendant was intensely fearful. Stark was rewarded for his persuasive tactics when his bond was reduced, and Stark posted bail and was released soon after Deputy Miller's first recorded interview with defendant. When defendant realized that he had

been tricked by Stark, yet still unaware of the relationship between Deputy Miller and Stark, defendant recanted his prior statements to Deputy Miller. Deputy Miller's knowledge of the escape plan and his involvement in the deception were never recorded and never disclosed to the defense.

We find that the trial court's factual findings were not against the manifest weight of the evidence. Deputy Miller admitted that he and Stark had a history of Stark providing Deputy Miller with information in exchange for lenient consequences for Stark's illegal behavior. Deputy Miller admitted knowledge of the previous interrogation of defendant in which defendant asserted his right to remain silent. Even though Stark and Deputy Miller testified that Stark's placement in jail near defendant, and the coincidence of such placement, was the result of mere happenstance, Deputy Miller soon learned of Stark's deception of defendant concerning the escape scheme. Deputy Miller encouraged Stark to continue the interplay with defendant. Stark was ultimately rewarded when his charge was later reduced to misdemeanor theft. Defendant had an intense fear of returning to Menard. Stark was aware of that fear and utilized it to promote the escape scheme to persuade defendant to confess. Based on the totality of the circumstances, we conclude that defendant's confession was the result of deceptive interrogation tactics calculated to overcome defendant's free will at the time of his confession and that defendant's confession cannot be deemed to be the product of a rational intellect. The trial court correctly granted defendant a new trial, an authorized disposition under section 122-6 of the Post-Conviction Hearing Act (725 ILCS 5/122-6 (West 2000)).

Sanctions

The State further argues that the circuit court was without authority to order sanctions against the office of the State's Attorney of St. Clair County because Supreme Court

Rule 137 (155 Ill.2d R. 137) is inapplicable to proceedings initiated under the Post Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)).

Illinois Supreme Court Rule 137 provides in pertinent part as follows:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion[,] or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law[;] and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." 155 Ill.2d R. 137.

Section 122-4 of the Post Conviction Hearing Act, regarding pauper petitions, provides, "A petitioner who is a prisoner * * * who files a pleading * * * that purports to be a legal document seeking post[ ]conviction relief * * * against the State * * * in which the court makes a specific finding that the pleading * * * is frivolous shall not proceed as a poor person and shall be liable for the full payment of filing fees and actual court costs * * *." 725 ILCS 5/122-4 (West 2000). Contrary to the State's assertion, section 122-4 does not prohibit the application of Rule 137 in postconviction proceedings. See also 725 ILCS 5/122-5 (West 2000) (regarding proceedings on a postconviction petition, this section provides, "The court may in its discretion make such order as to * * * filing further pleadings * * * as shall be appropriate, just[,] and reasonable and as is generally provided in civil cases.").

Imposing sanctions pursuant to Illinois Supreme Court Rule 137 is within the sound discretion of the trial court, and the trial court's decision will not be disturbed by a court of review absent an abuse of discretion. *Wagener v. Papie,* 242 Ill.App.3d 354, 363, 182 Ill.Dec. 417, 609 N.E.2d 951 (1993).

In imposing sanctions, Judge Scrivner held that the State's conduct in filing the motion to transfer to the original trial judge and the motion to vacate the order for discovery, while never requesting a hearing, thereby abandoned said issues and caused defendant's attorney a great waste of time and effort. Judge Scrivner also held that the motion for substitution of judge for cause was not well founded in fact or warranted by existing law and that the motions were filed to unnecessarily delay the proceedings and increase the cost of litigation for defendant. The trial court did not abuse its discretion in imposing sanctions against the State.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

CHAPMAN and MAAG, JJ., concur.

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL DISTRICT, ST. CLAIR COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 79-CF-327
vs.	)	
GREGORY BOWMAN,	)	
Defendant.	)	

ORDER ON POST-CONVICTION

This matter came before the Court for evidentiary hearing pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (West 1998)) on defendant's petition for post-conviction relief, filed June 03, 1999, alleging the existence of new evidence that Sheriff's Investigator Robert Miller, in concert with an informant, used fraud and trickery to obtain admissions from the defendant, thereby undermining his 1979 murder convictions. He asserts Fifth, Sixth, and Fourteenth Amendment violations. He further asserts a freestanding claim of innocence. He does not claim the ineffectiveness of his trial counsel. The new evidence which defendant contends entitles him to a new trial came to light as a result of articles published in the St. Louis Post-Dispatch based on a February, 1999, interview of Miller by Carolyn Tuft and Bill Smith, reporters with that newspaper.

The Court has considered the record, the evidence, including the testimony of the witnesses and has made assessments of their credibility, and now being fully advised in the premises, finds and orders as follows:

On October 24, 1979, defendant was convicted of the murders of Elizabeth West, age 14, and Ruth Ann Jany, age 21. On that day, in Mount Vernon, where the cause had transferred for trial on change of venue, the parties announced an agreement wherein Bowman waived his rights to a trial by jury, to cross examine the State's witnesses, and to present any defense, in return for the State's agreement to forego the death penalty. Bowman's lawyer told the judge:

> "What we are doing here is predicated somewhat upon the Supreme Court decision in *North Carolina v. Alford*, which is 400 U.S. Number 25; wherein the Court recognized - recognized the situation where an accused may wish to plead guilty and yet not admit the facts during the course of the plea taking. which is the situation here. And the court has indicated a reluctance to accept the plea in that fashion. Mr. Bowman has indicated non-willingness to concede particular facts leading to that admission of guilty plea. And what we are doing is in lieu of that and letting the Court make a finding of guilty without the necessity of Mr. Bowman actually indicating the factual basis for that. And in addition to what we are doing here, Mr. Bowman's position is that he, in effect, is pleading guilty, desires to plead guilty.
>
> THE COURT: Is that correct, Mr. Bowman?

DEFENDANT: Yes." (Transcript page 3)

The Court then proceeded to give the usual admonitions to the defendant given in guilty pleas. What then followed was an extended factual basis, in accordance with *North Carolina v. Alford*, (1970), 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160, provided by witnesses not subject to cross-examination and without defense nor argument by the defense. The outcome was never in doubt, as Bowman conceded on the stand. The proceeding was a guilty plea. (Compare *People v. Jones*, 311 Ill. App. 3d 433, 723 N.E.2d 1217, 243 Ill.Dec. 616 (Fifth Dist. 2000)) Thereafter, on November 30, 1979, Bowman was sentenced to two concurrent terms of natural life imprisonment. Within thirty days of the imposition of sentence, defendant filed a motion to withdraw plea of guilty and vacate judgment. The body of the motion characterized the proceeding as an uncontested bench trial as a substitute for plea of guilty. It further recited that no issue was taken with the proceedings or plea bargain but that counsel deemed the motion necessary to vest jurisdiction in the appellate court to appeal the sentence. Upon the denial of this motion, the defendant appealed his sentence only. On March 29, 1982, the appellate court affirmed the sentences by Rule 23 order (#80-29).

2. On April 22, 1978, Elizabeth West disappeared while walking home at approximately 11:00 p.m. from Belleville West High School. On May 5, 1978, Elizabeth West's body was found, lying face down in a wooded creek approximately 100 feet from a dirt road in Waterloo, Illinois.

3. On July 7, 1978, Ruth Ann Jany disappeared from a First National Bank automated teller bank machine located in Belleville around 11:37 p.m. On July 24, 1979, her remains were found in a field approximately 20 feet from a farmer's road in Hecker, Illinois.

4. On July 20, 1978, around 11:00 p.m., the defendant abducted Jeanne Taylor at knifepoint from a laundromat in Belleville and forced her into his car. She was able to escape from the defendant after struggling for several blocks. She suffered various cuts and bruises. Witnesses provided police with the defendant's license plate number. Defendant was arrested two days later, at his father's home in Belmont, Illinois. He was charged with the kidnapping and unlawful restraint of Ms. Taylor in case #78CF424.

5. On July 28, 1978, while defendant was incarcerated in the St. Clair County Jail, Investigator David Gravot of the St. Clair County Sheriff's Department, in whose venue the body had been found, sought to question defendant as an obvious suspect in the abduction and murder of Elizabeth West. Gravot warned defendant pursuant to **Miranda v. Arizona** (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602. The defendant invoked his Fifth Amendment right to counsel and referred all questions to his attorney, the late Robert H. Rice. The invocation was honored and the interview terminated.

6. About six months later, following a three-day jury trial, the defendant was convicted of the Taylor charges. On February 27, 1979, he was sentenced to 14 years imprisonment in the Illinois Department of Corrections.

7. On March 10, 1979, while defendant remained incarcerated in the St. Clair County Jail awaiting transportation to the Department of Corrections, Danny Stark, a fellow cell-block mate of the defendant, sought out Investigator Robert Miller of the Sheriff's Department, whom he knew from prior arrests, to inform that defendant had made statements implicating himself in the abduction and murder of Elizabeth West. Stark had been arrested December 28, 1978, when

caught unloading a stolen liquor truck. He had been in custody continuously since then for want of $20,000 bail.

8. On March 20, 1979, the defendant told jailers he wanted to talk to a detective. Miller appeared, admonished defendant of his constitutional rights, obtained a waiver and conducted an oral interview during which defendant admitted the abduction, assault and murder of Elizabeth West. He promised a future written statement and to take Miller to the location of the Jany body, yet unfound.

9. There then ensued, on March 21, 22, and 25, 1979, a series of "cat and mouse" meetings between defendant and Miller, now armed with a judicially approved covert electronic recorder, in which each essayed strategic deception on the other for their own respective purposes: Bowman, on the one hand, making admissions and statements implicating himself in the killings, yet declining to provide "hard" evidence against himself by trying to limit his answers to matters he had read in the newspapers, or been told by police officers on previous occasions, refusing to put anything on paper nor leading Miller to the location of the Jany body - yet promising do so, on Sunday, after he ostensibly talked with his father - all for the purpose of delaying his departure for Menard Penitentiary, so that Stark could make bail an return to help Bowman escape; Miller, on the other hand, feigning ignorance of the escape plan, asking to be led to Jany's body so as to justify to his superiors delaying Bowman's transfer to Menard. Stark's bond was reduced, at the request of an assistant state's attorney to $500.00 cash, on March 21, 1979. Stark posted bail and was released at 6:40 p.m., soon after the first recorded interview with Bowman. When the escape did not materialize, Bowman recanted his prior statements in the third recorded

interview on March 25, without admitting the escape plan to Miller.

10. Following a comparison of the transcript of the interviews with known, unreported, facts, ostensibly known only to the killer, Bowman was indicted, on May 25, 1979, for the murder of Elizabeth West. In September 1979, after her body was found, he was charged with the Jany murder.

11. At hearing, the defendant testified that the escape plan originated with Stark and that he falsely confessed to Miller, to gain time for his escape. He was confident he would not be charged, since he had alibis for both the West and Jany murders and his lawyer had told him there was insufficient evidence to implicate him. His knowledge of the crimes, he stated, as he had in recanting to Miller, came from newspaper articles, police reports and information learned from investigating officers during interviews. He denied ever admitting the crimes to Stark.

12. Defendant further testified, and the Court finds, he was unaware of Miller's involvement with Stark in the escape plan until 1999 when he read about it in the Post-Dispatch. After he was charged with the murders he told his attorney, Robert Rice, about the escape plan and why he had given the statements to Deputy Miller. They agreed that an attempt to suppress Bowman's statements to Miller, on the theory that Stark had induced Bowman to make the statements to Miller to buy time for the escape plan to develop, would fail. The Court agrees. Absent evidence of State involvement, one runs the risk that one he confides in, in a jail environment or elsewhere, is an informant. (*Illinois v. Perkins* (1990), 496 U.S. 292, 110 L.Ed.2d 243, 110 S.Ct. 2394)

13. The record indicates Rice sought to suppress the statements in the Jany case, on the theory that Bowman's reluctance to discuss the Jany case until Sunday was an

invocation of his right to silence and that Miller's persistence in seeking to advance that schedule was coercion. The motion was denied. Rice's motion seeking to admit the transcript of the March 25, recantation was denied. The State's motion to be allowed to prove the Taylor case in the murder cases, as evidence of motive, intent, modus operandi and identification, was granted. Proof of Bowman's other convictions would be allowed if he testified.

14. Danny Stark testified that he was a cellmate of the defendant in March of 1979. He was not aware of any action on Miller's part to place him in Bowman's cellblock. He recalled that the defendant admitted that he was responsible for the West and Jany murders and that he so informed Miller. He testified that Miller told him to keep listening to the defendant, but did not devise an escape scheme with Stark. He was aware Bowman feared returning to Menard. Bowman and Stark concocted the escape scheme. Between them, he did not know [remember] who initiated it. He admitted he told Miller about the escape plan.

15. Retired Sergeant Robert Miller testified that he remembered Stark coming to him in March of 1979, and told him that the defendant had implicated himself in the West murder. Miller said he told to Stark was to keep listening and to report. He denied planting Stark in Bowman's cellblock; nor did he devise the escape scheme. Miller first said he did not know that the defendant was afraid of going to prison. He learned of the escape plan from Stark, but that it was his understanding that Stark and the defendant had devised it. Ultimately, he conceded that he probably instructed Stark "in a round about way" to induce Bowman to discuss the case with police to gain time for the "escape." He also conceded he might have said the same to the reporters in 1999 and that he may have intervened in the lowering of Stark's bond.

16. It is apparent to the Court that Miller's intervention in lowering Stark's bond furthered the inducement. Miller's knowledge of the escape plan and the true extent of Stark and Miller's involvement in the ruse were never recorded in his official police reports and thus never disclosed to the defense.

17. The defendant has advanced several theories in support of his claim to a new trial. They have in common the heretofore-undiscovered essential fact of "clandestine state action" in obtaining admissions from defendant that were crucial in his conviction.

18. Defendant cites the court to *People v. Perkins*, 248 Ill. App. 3d 762, 618 N.E.2d 1275, 188 Ill. Dec. 705 (Fifth Dist. 1993) rehearing denied September 14, 1993. Petition for Leave to Appeal denied December 1, 1993, in support of his Fifth Amendment claim. The Court finds the case distinguishable. In *Perkins*, the fifth district ruled that undercover agents could not surreptitiously question an incarcerated defendant who had previously asserted his Fifth Amendment right to counsel. The surface appeal of this case is apparent since the ruse employed to get Perkins talking was a phony escape plan.

19. *Perkins* relied heavily on *Edwards v. Arizona* (1981), 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880, which held: "When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. We further hold that an accused, *** having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or

conversations with the police." {N.E.2d 1281} {Ill. Dec. 711} (*Edwards*, 451 U.S. at 484-85, 68 L.Ed.2d at 386, 101 S.Ct. at 1884-85.) The Court explained, that in the particular facts of that case, the government's procedure was calculated to deceive Perkins, so that he would not know to whom he was making incriminating statements and thereby not given an opportunity to knowingly and intelligently waive his previously asserted right to have counsel present during questioning. Perkins was merely responding to further police-initiated custodial interrogation, in violation of *Edwards*. (*Perkins*, 248 Ill. App. 3d at 769)

20. Here, there is no evidence of surreptitious jail cell questioning by Stark. Bowman denies he ever admitted to the murders to Stark. The "accused himself initiated further communication" (*Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 77 L.Ed.2d 405, 412, 103 S.Ct. 2830, 2834 (1983)) Bowman went to Miller; he knew Miller was a police officer. Where, as here, the issue is whether the "accused himself initiated further communication" (*Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 77 L.Ed.2d 405, 412, 103 S.Ct. 2830, 2834 (1983)), the preliminary inquiry is whether, under the totality of circumstances, the defendant initiated the conversation in a manner evincing a "willingness and desire for a generalized discussion about the investigation" (*People v. Olivera*, 164 Ill.2d 382, 391, 647 N.E.2d 926, 207 Ill. Dec. 433 (1995)). Bowman wanted to talk to Miller about the investigation. He testified he wanted to confess falsely. It would seem obvious that the last thing he would want would be to talk to a lawyer who would be under an ethnical duty to disclose any future escape attempt. Bowman waived his Fifth Amendment rights.

21. In *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed.2d 215, the Supreme Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence

is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The holding applies to the prosecution and their agents. In pre-trial motions for discovery Bowman's attorney, Bob Rice, had requested Brady material. The suppressed evidence would have been outcome determinative. Had Bowman's lawyer known true role played by Stark and Miller's in developing the evidence against Bowman, he would undoubtedly have moved its suppression. The outcome could well have been different.

22. Miller's decision to return an instructed Stark, as *agent provocateur*, to Bowman's cellblock rendered Stark an agent of the prosecution sufficient to impute his conduct to Miller who was in turn an agent of the prosecution. (*People v. Robinson*, 157 Ill.2d 68, 623 N.E.2d 352, 191 Ill.Dec. 107 (1993)). Miller's failure to record and disclose his actions constitutes the suppression of evidence favorable to the defense within the meaning of *Brady v. Maryland, supra.*

23. Defendant argues that his incriminating statements to Miller were involuntary in violation of the due process clause of the Fourteenth Amendment. In *Colorado v. Connelly*, 479 U.S. 157, 93 L.Ed. 2d 473, 107 S.Ct. 515 (1986), the United States Supreme Court held that coercive police activity is a necessary predicate to the finding that a statement is not "voluntary" within the meaning of the due process clause. While mental condition is relevant to an individual's susceptibility to police coercion, the mere examination of the declarant's state of mind can never conclude the due process inquiry. A voluntariness analysis under the due process clause must focus on the crucial element of police overreaching.

24. Thus, in the present case, the constitutional voluntariness of defendant's statements depends on the absence of police overreaching. The Court's inquiry is, therefore, confined to an analysis of Miller's conduct and whether that

conduct was causally related to defendant's admissions and whether, under the totality of the circumstances, Miller obtained defendant's statements in a manner that comports with due process. The Court concludes that he did not. Under the unusual facts of this case, the escape ruse orchestrated through Stark's agency is a type of police overreaching that could result in a false confession. It is conceivable that Bowman, guilty of the Taylor kidnapping and headed for prison, could confess falsely to the murders to effect his escape, in other words, avoid the consequences of his statements, as he says he did here.

25. In *People v. Washington*, 171 Ill.2d 475, 489 (1996), the court held, as a matter of state constitutional due process, that a post-conviction petitioner may pursue a freestanding claim of actual innocence based on newly discovered evidence. To win relief under that theory, the supporting evidence must be new, material, and noncumulative, and it must be of such conclusive character that it would probably change the result on retrial. (*Washington*, 171 Ill.2d at 489). Newly discovered evidence must be evidence that was not available at defendant's trial and that the defendant could not have discovered sooner through diligence. People v. Burrows, 172 Ill.2d 169, 180 (1996).

26. In *North Carolina v. Alford*, (1970), 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160, the Supreme Court held that an accused may voluntarily and knowingly and understandingly consent to the imposition of a prison sentence, to avoid the death penalty, even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence, when he intelligently concludes that his interests require a guilty plea and the record strongly evinces guilt.

27. While it is somewhat incongruous for Bowman to assert a claim of innocence in the light of what the Court has

determined to have been an Alford plea, Bowman cannot be held to have stipulated to what neither he nor his lawyer knew so as to bar the claim, as waived, by the plea.

28. The element of "state action" revealed in February of 1999 constitutes newly discovered evidence in the case that is of such a material and conclusive character as to probably change the outcome or result on retrial. Furthermore, the evidence could not have been discovered prior to trial by the exercise of due diligence by the defendant and his attorney, due to its exclusion from any police reports.

ACCORDINGLY, for all the foregoing reasons, the Court finds a new trial is constitutionally mandated under due process clause of the federal and state constitutions.

The Clerk of this Court shall forward copies of the order as indicated below.

IT IS SO ORDERED.

_____

Richard A. Aguirre, Judge

DATED: 04/12/01

Al W. Johnson, Defendant's Attorney

Elizabeth Nester, Asst. State's Attorney

Ed K.

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL DISTRICT, ST. CLAIR COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 79-CF-327
vs.	)	
GREGORY BOWMAN,	)	
Defendant.	)	

BE IT REMEMBERED AND CERTIFIED THAT heretofore, on to-wit: Wednesday, October 24, 1979, being one of the regular judicial days of this Court, the matter as hereinbefore set forth came on for hearing before the HONORABLE STEPHEN M. KERNAN, Circuit Judge in and for the Twentieth Judicial Circuit, St. Clair County, Illinois, and the following was had of record in Jefferson County of the Second Judicial Circuit, Mt. Vernon, Illinois to-wit:

(The following proceedings were had in Courtroom C, with both the Court, counsel, and the Defendant present, out of the hearing and presence of the prospective jurors.)

THE COURT: This is case numbered 79-CF-327; the case of the People of the State of Illinois vs. Gregory Bowman. The matter is called for trial this morning.

It is my understanding that some negotiations have taken place between the State and Defendant and defense counsel, and I think we ought to get those on the record this morning before any trial commences.

Is it my understanding that the Defendant is waiving his right to a trial by jury, in exchange for which the State is waiving its plea for possible death sentence, and we are going to proceed in the fashion of a bench trial, without evidence being presented by the Defendant or cross examination by Defendant of any of the State's witnesses, in effect–or, as a practical matter, the Defendant would be giving up his right to an actual trial and, in effect, would be pleading to the case?

MR. RICE: Yes, sir.

THE COURT: Is that correct, Mr. Kuehn?

MR. KUEHN: That is my understanding, Your Honor, of the negotiations.

THE COURT: Mr. Bowman, do you understand what is going on this morning?

DEFENDANT: Yes, I do.

THE COURT: Do you understand you have a right to have this case heard before a jury, and if you give–you are giving up that right this morning; do you understand that?

DEFENDANT: Yes.

THE COURT: Do you know what a jury trial is?

DEFENDANT: Yes, I do.

THE COURT: That would be when twelve men and women, who are selected by yourself, your attorney and the State's Attorney, listen to all the evidence in the case. And after listening to all the evidence in the case, they would decide

whether you were guilty or not guilty of the two charges of murder. Should they find you to be guilty, then it would be the duty of the Court to sentence you. On the other hand, should they find you to be not guilty, you would be released and the case would be closed. And whichever way they would decide, whether it be guilty or not guilty, their decision would have to be unanimous; they would all have to agree; do you understand that?

DEFENDANT: Yes.

THE COURT: And, of course, the State has the burden in such a trial of proving you guilty beyond a reasonable doubt; you don't have to prove your innocence; do you understand that?

DEFENDANT: Yes.

THE COURT: Okay. Now, would you wish to give up your right to have this case heard before a jury?

DEFENDANT: Yes, I do.

THE COURT: All right. Would–do you also understand Mr. Bowman, that pursuant to this agreement, your attorney won't be putting on any defense for you?

DEFENDANT: I understand that.

THE COURT: You won't be testifying; you won't be presenting any witnesses testifying in your behalf; do you understand that?

DEFENDANT: Yes.

THE COURT: In fact, it is my understanding that your attorney will not even be cross examining any of the State's witnesses; do you understand that?

DEFENDANT: Yes, I do.

THE COURT: In effect, this is–you are giving up your right to have a trial; do you understand that?

DEFENDANT: Yes.

THE COURT: Okay.

MR. RICE: Your Honor, could I interject for the record–

THE COURT: Yes.

MR. RICE: –a little posture and background?

THE COURT: Yes.

MR. RICE: May it please the Court, what we are doing is predicated somewhat upon the Supreme Court decision in North Carolina vs. Alford, which is 400 U.S. Number 25; wherein, the Court recognized–recognized the situation where an accused may wish to plead guilty and yet not admit the facts during the course of the plea taking, which is the situation here. And the Court had indicated a reluctance to accept the plea in that fashion.

Mr. Bowman had indicated a willingness to plead but a non-willingness to conceed particular facts leading to that admission of guilty plea. And what we are doing is in lieu of that and letting the Court make a finding of guilty without the necessity of Mr. Bowman actually indicating the factual basis for that.

And in addition to what we are doing here, Mr. Bowman's position is that he, in effect, is pleading guilty, desires to plead guilty.

THE COURT: Is that correct, Mr. Bowman?

DEFENDANT: Yes.

THE COURT: Why don't we do this then: I have a standard set of rights and things that I read to someone who is pleading guilty; why don't I read these to Mr. Bowman this morning, since, in effect–or as a practical matter, he is giving up his right to have a trial?

Mr. Bowman, let's start off with this: Would you give us your full name and age for the record, please?

DEFENDANT: Gregory Allen Bowman; 28.

THE COURT: And how far did you get in school?

DEFENDANT: Approximately 16 years.

THE COURT: Okay. Have you received a copy of the Indictment or the charges in this case?

DEFENDANT: Yes, I have.

THE COURT: And have you gone over those with your attorney?

DEFENDANT: Yes, I have.

THE COURT: Do you understand that you presently stand charged with two charges of Murder?

In Count I of that charge, it is alleged that on or about the 7th day of July, 1978, you committed the offense of Murder, in that you did, without lawful justification, killed another individual, to-wit: Ruth Ann Jany, by inflicting upon her injuries which caused her death on or about the 7th day of July, 1978, by strangling her, the same being done then and there with your hands and an instrument or instruments unknown to the Grand Jury and by leaving her body exposed to the natural elements, and when in the performance of said acts which caused the death of Ruth Ann Jany you (1) either intended to kill or do great bodily harm to said Ruth Ann Jany, or knew that

your acts would cause death to said Ruth Ann Jany, or (2) that you knew your acts created a strong probability of death or great bodily harm to Ruth Ann Jany or (3) that you were attempting to commit or were–or was committing a forcible felony upon Ruth Ann Jany, to-wit, kidnapping in violation of the Illinois Criminal Code of 1961 as amended in Section 10-1A1, in that you knowingly and secretly confined Ruth Ann Jany against her will, or (4) that you were attempting to commit or were committing a forcible felony upon said Ruth Ann Jany, to-wit, Rape in violation of the Illinois Criminal Code of 1961, as amended in Section 11-1A, in that you, being a male person of the age of 14 years and upwards, had sexual intercourse with Ruth Ann Jany, a female not your wife, by force and against her will.

In Count II of that Indictment, you are charged with Murder that is alleged have occurred on the–on or about the 23rd day of April, 1978, in that you did, without lawful justification, killed another individual, to-wit: Elizabeth West, by inflicting upon her injuries which cased her death on or about the 23rd day of April, 1978, by striking her about her head and by strangling her, the same being done then and there with your hands and an instrument or instruments unknown to the Grand Jury, and when in the performance of said acts which caused the death of said Elizabeth West, you (1) either intended to kill or do great bodily harm to said Elizabeth West or knew that your acts would cause death to said Elizabeth West, or (2) that you knew your acts created a strong probability of death or great bodily harm to Elizabeth West, or (3) that you were attempting to commit or was committing a forcible felony upon Elizabeth West, to-wit, kidnapping in violation of the Illinois Criminal Code of 1961 as amended in Section 10-1A1, in that you knowingly and secretly confined Elizabeth West against her will, or (4) that you were attempting or was committing a forcible felony upon said Elizabeth West, to-wit, Rape in violation of the Illinois Criminal Code of 1961, as amended in

Section 11-1A, in that you, being a male person of the age of 14 years and upwards, had sexual intercourse with Elizabeth West, a female not your wife, by force and against her will.

Is there anything about those charges that you don't understand?

DEFENDANT: No, sir.

THE COURT: Is there any–any wording in those charges that you don't understand?

DEFENDANT: No, sir.

THE COURT: Have you discussed this–it's not really a plea arrangement, but pursuant to these negotiations, this trial that we are about to have this morning without a jury and without you presenting any evidence; have you discussed this with your attorney?

DEFENDANT: Yes, I have.

THE COURT: Do you need any additional time to talk it over with him?

DEFENDANT: No, I don't.

THE COURT: Are you satisfied that this arrangement is in your best interest?

DEFENDANT: Yes.

THE COURT: Are you also satisfied with Mr. Rice's representation of you?

DEFENDANT: Yes, I am.

THE COURT: And, Mr. Rice, have you discussed this arrangement with Mr. Bowman?

MR. RICE: I have. Your Honor.

THE COURT: And are you likewise satisfied that this arrangement is in his best interest.

MR. RICE: Definitely.

THE COURT: Have you also discussed with him, with Mr. Bowman, his rights and the possible consequences of this arrangement here this morning?

MR. RICE: I have, Your Honor.

THE COURT: Okay. You don't need any additional time to talk it over with him?

MR. RICE: No, sir, Your Honor.

THE COURT: Mr. Bowman, before we enter into this sort of trial, or this arrangement, I want you to understand that you previously plead not guilty to these charges and would have a right to continue to plead not guilty to these charges and to have an actual full-blown trial on the matter; do you understand that?

DEFENDANT: Yes.

THE COURT: Do you understand that by entering into this agreement this morning, you would be giving up certain rights?

DEFENDANT: Yes.

THE COURT: I was going to say you would be giving up your right to a speedy and a public trial, but this is, in effect, a trial, so you are not actually giving up that right.

You are giving up your right, however, to have your case heard before a jury, or if you wish to give up your right to a jury trial, to be heard before a Judge alone; do you understand that?

DEFENDANT: Yes.

THE COURT: You have a right to present witnesses and evidence in your own behalf at a trial. And the Court has the power to order that those witnesses and that evidence be present for you. You will be giving up that right; do you understand that?

DEFENDANT: Yes.

THE COURT: You have a right to confront and to question in open Court any witnesses who might testify against you in this case, and pursuant to these arrangements, you are giving up your right to question these witnesses; do you understand that?

DEFENDANT: Yes.

THE COURT: Nobody can force you to testify in your own behalf at this trial or to make any statements against your interest. This is called the privilege against self-incrimination. Pursuant to this agreement, I assume that the Defendant is not giving up that right; correct?

MR. RICE: Yes.

THE COURT: He will be standing on that right.

MR. RICE: Yes, sir.

THE COURT: You have, or course, a right to an attorney at all stages of this case, both before the trial, during the trial and if any appeals are necessary, after the trial. And if at any time you are found to be indigent or poor and can't afford a lawyer, the Court would appoint one for you at no cost to you; and that would be the Public Defender's Office; do you understand that?

DEFENDANT: Yes.

THE COURT: You are–finally, you are presumed to be innocent of both of these charges until you are proven guilty beyond a reasonable doubt. And the State has the burden of proving you guilty; you don't have to prove that you are innocent. But do you understand that by entering into this agreement this morning, where you are not going to be putting on any defense and you are not going to be questioning any witnesses, as a practical matter, you are giving up your right to be presumed innocent of this charge; do you understand that?

DEFENDANT: I understand that.

THE COURT: For all practical purposes, the effect of this would be like a plea of guilty; do you understand that?

DEFENDANT: Yes, I understand that.

THE COURT: Do you have any questions about any of these rights that I have just explained to you?

DEFENDANT: No, I don't.

THE COURT: Whose idea is this that you plead guilty here today?

DEFENDANT: Pardon?

THE COURT: Whose idea is this that you enter into this arrangement here this morning?

DEFENDANT: My attorney's.

THE COURT: Okay. Is this your idea after discussing it with him?

DEFENDANT: Yes. I agree with him, yes. He is the one that first mentioned it and I agreed with him after he explained it to me.

THE COURT: You understand that ultimately this decision rests on your?

DEFENDANT: I understand that.

THE COURT: Are you making this decision to enter into this agreement freely and voluntarily?

DEFENDANT: I am.

THE COURT: Has anybody threatened or coerced you or any member of your family in any way to get you to enter into this agreement?

DEFENDANT: No.

THE COURT: Has anybody promised you any reward for entering into this agreement?

DEFENDANT: No.

THE COURT: Has anybody promised you anything for entering into this agreement other than the offer of the State to withdraw their prayer for the death penalty in the event that you agree to proceed with a trial such as this?

DEFENDANT: No.

THE COURT: You understand that if anybody has offered you anything or suggested to you anything that you might be able to get by entering into this agreement which has not been stated in open Court, it's not binding upon me in any way?

DEFENDANT: I understand that.

THE COURT: Okay. One thing further, although the State is not requesting the death penalty in this case, do you understand that by entering into this-or entering into this agreement, which, as I had mentioned before, as a practical

matter, is pleading guilty, you could be sentenced to a fixed or determinate number of years in the State penitentiary, ranging anywhere from a minimum of 20 years to a maximum of 80 years? Do you understand that?

DEFENDANT: I understand that.

THE COURT: There is also the possibility that you could be sentenced to the State penitentiary for a term called "natural life"; do you understand that?

DEFENDANT: I understand that.

THE COURT: Now, should you receive a fixed or determinate sentence, a number of years, for each day of that sentence that you serve without violating the prison rules and regulations, you would actually earn an additional day's credit towards your sentence and, therefore, only serve one-half of the time to which you were sentenced; do you understand that?

DEFENDANT: I do.

THE COURT: Further, should you receive a prison sentence such as that, upon your release from prison, you would be subject to a three-year period of mandatory supervised release; that used to be called parole. And for that three years period, you would be given a list of things you could do and a list of things you couldn't do. And if you violated the terms or the conditions of your release period, you could be sentenced back to the penitentiary; do you understand that?

DEFENDANT: I understand that.

THE COURT: Do you also understand that any sentence that is imposed by this Court pursuant to these charges could also be consecutive to any other sentences that you have previously received?

DEFENDANT: I understand that.

THE COURT: It is my understanding you previously received 14 years for kidnapping.

Do you understand that whatever sentence you receive here could be stacked on to the tail end of that sentence?

DEFENDANT: I do.

THE COURT: Do you have any questions about that?

DEFENDANT: No.

THE COURT: Do you also understand that by–when I say "natural life," that sentence means that you could be sentenced to the penitentiary for the rest of your life without the possibility of parole or release, except the chance that the Governor might pardon you–

DEFENDANT: I understand that.

THE COURT: –do you understand that?

So that you would be spending the rest of your days behind bars.

DEFENDANT: (Nodding head.)

THE COURT: Do you have any questions at all about what you are charged with?

DEFENDANT: No.

THE COURT: Any questions about your rights as far as having a lawyer and a full-blown trial, presenting witnesses and everything that I explained to you?

DEFENDANT: No.

THE COURT: Any questions about the possible punishments you could receive?

DEFENDANT: No.

THE COURT: Would you still wish to enter into this arrangement that Mr. Rice has outlined for us?

DEFENDANT: Yes.

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

No. 03-375

IN THE

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

v.

GREGORY BOWMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

BRIEF IN OPPOSITION

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STATEMENT

Twenty years after his convictions, Respondent discovered new evidence showing that his *Alford* plea[1] was unknowing and involuntary. Respondent learned that the detective to whom he originally confessed, Robert Miller, and a cellblock mate, Danny Stark, had collaborated and used fraud and trickery to obtain a false confession from Respondent, thereby rendering his confession coerced and his constitutional rights violated. On June 3, 1999, Respondent Gregory Bowman filed a petition for post-conviction relief in the Circuit Court for the Twentieth Judicial District, St. Clair County, Illinois. The trial court conducted an evidentiary hearing, and on April 12, 2001 the court held that a new trial is constitutionally mandated under the due process clause of the federal and state constitutions. On December 27, 2002, the Appellate Court of Illinois, Fifth Judicial District, affirmed the judgment of the trial court. On June 4, 2003, the Supreme Court of Illinois denied Petitioner's petition for leave to appeal.

In its Order on Post-Conviction, the trial court detailed various findings of fact. As essentially noted by the Appellate Court of Illinois, these findings include the following:

(1) On March 10, 1979, while Respondent remained in the St. Clair County jail awaiting transport to Menard Penitentiary, of the Illinois Department of Corrections, concerning an unrelated conviction, cellblock mate Danny Stark approached Deputy Robert Miller alleging that Respondent had made statements implicating himself in the abduction and murder of Elizabeth West. (Appendix ("App.") 9a, 23a-24a).[2]

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1. Respondent does not concede that he, indeed, entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). In this brief, however, Respondent assumes *arguendo* that he entered an *Alford* plea.

2. Appendix references in this brief in opposition cite appendix page numbers in Petitioner's Petition for a Writ of Certiorari.

(2) On March 20, 1979, Respondent told jailers he wanted to talk to a detective. Miller appeared, obtained a waiver of Respondent's constitutional rights, and conducted an oral interview during which Respondent admitted to the murder of Elizabeth West. Respondent promised a future written statement and to take Deputy Miller to Ruth Ann Jany's body, yet unfound. (App. 9a, 24a).

(3) On March 21, 22, and 25, 1979, Respondent implicated himself to Deputy Miller in both murders. He promised to lead Deputy Miller to Ruth Ann Jany's body on Sunday, March 25, 1979, all for the purpose of delaying his departure to Menard so that Stark could make bail and return to help Respondent escape. During these meetings between Respondent and Miller, Miller feigned ignorance of the escape plan and pressured Respondent to lead Miller to Ruth Ann Jany's body to justify delaying Respondent's transfer to Menard. (App. 9a-10a, 24a).

(4) Stark's bond was reduced, at the request of an assistant State's Attorney, to $500 cash, and on March 21, 1979, Stark posted bail and was released at 6:40 p.m., soon after the first recorded interview with defendant. (App. 10a, 24a).

(5) When the escape plan did not materialize, defendant recanted his prior statements, without revealing the escape plan to Deputy Miller. (App. 10a, 24a-25a).

The appellate court noted that the trial court found that Deputy Miller, with the knowledge that Respondent had previously asserted his right to remain silent, collaborated with Stark to obtain Respondent's confession to the murders. (App. 16a). According to the deceptive scheme, Respondent would provide a confession, which would delay his return to Menard so that Stark could help Respondent escape from the county jail. (App. 16a-17a, 24a-27a). As noted by the appellate court, Miller knew of the escape plan and was involved in the deception of Respondent. (App. 17a). As the trial court found, Respondent was unaware of Miller's involvement with Stark

in the escape plan until 1999 when he read about it in the St. Louis Post-Dispatch. (App. 25a). Miller had never recorded or disclosed to the defense his knowledge and involvement in the deception. (App. 17a).

The trial court held that Miller's failure to record and disclose his actions concerning the ruse with Stark constituted the suppression of evidence favorable to the defense within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the suppressed evidence would have been outcome determinative. (App. 29a). The ruse was a type of police overreaching that could result in a false confession. (App. 30a). Furthermore, the Court held that Respondent cannot be held to have stipulated at the *Alford* plea hearing what neither he nor his lawyer knew so as to bar this claim seeking post-conviction relief as waived by the plea. (App. 31a).

On appeal, the appellate court noted that neither the State nor Respondent addressed how the ramifications of Respondent's *Alford* plea relate to Respondent's contentions concerning his coerced confession.[3] (App. 12a). The appellate court held that "if a defendant enters a guilty plea but maintains his innocence of the crime, as permitted by *Alford*, and the State's factual basis for the defendant's plea primarily concerns a confession, of which facts unknown at the time of the defendant's plea suggest coercion, the defendant may collaterally attack his guilty plea." (App. 14a). The appellate court then held essentially that Respondent's confession was involuntary. (App. 17a).

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3. Thus, Respondent contends that the State waived this issue.

REASONS FOR DENYING THE PETITION

This Court should deny Petitioner's petition for a writ of certiorari. First, Respondent submits that the holding of the Appellate Court of Illinois does not conflict with the cases cited in Petitioner's brief before this Court. Second, the decision of the Appellate Court of Illinois is consistent with this Court's precedents. Third, the decision of the Appellate Court of Illinois will not have the far-reaching and deleterious effects that Petitioner predicts.

A. The Holding of the Appellate Court of Illinois Does Not Create a Split of Authority with Cases Cited by Petitioner.

Respondent submits that Petitioner is essentially seeking an advisory opinion from this Court. The Question Presented does not fully reflect the holding of the Appellate Court of Illinois. Broadly construed, the Illinois Court's holding is limited to circumstances where the facts giving rise to the post-conviction hearing were unknown to defendant (or defendant's counsel) at the time of defendant's *Alford* plea, the prosecution essentially had a duty to disclose these underlying facts to defendant before defendant's entry of the *Alford* plea, these underlying facts pertained to a confession, and the prosecution's factual basis for the *Alford* plea primarily concerned the confession. Respondent submits that the cases cited by Petitioner to support the existence of a split of authority among the state courts did not involve these circumstances.

B. The Decision of the Appellate Court of Illinois is Consistent With This Court's Precedents.

As noted by Petitioner, the knowing and voluntary nature of a plea can be attacked. *United States v. Broce*, 488 U.S. 563 (1989) ("[w]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary"). Respondent

submits that the decision of the Appellate Court of Illinois in this case is essentially grounded in this undisputed legal principle. In its opinion, the Illinois Court discussed this Court's "*Brady* trilogy" and *Tollett v. Henderson*. *See Brady v. Henderson*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *Tollett v. Henderson*, 411 U.S. 258 (1973). The Illinois Court's holding is consistent with the *Brady* trilogy and *Tollett*.

As noted by the Appellate Court of Illinois, the United States Supreme Court refused to subject the defendants' pleas of guilty to collateral attack in each of the *Brady* trilogy cases and *Tollett*. In *Brady*, the defendant argued essentially that his plea of guilty was coerced by the prospect of receiving the death penalty. *Brady*, 397 U.S. at 743. But, this Court deemed his plea to be knowing and voluntary. *Id.* at 748. Pertinent to this Court's holding were the truth and reliability of defendant's plea and defendant's "solemn admissions in open court that he committed the act with which he is charged." *Id.* at 757-58. This Court also noted that a "plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by . . . misrepresentation. . . ." *Id.* at 755.

Similarly, in *McMann*, this Court rejected defendants' arguments essentially that their pleas of guilty should be set aside because their confessions were involuntary. *See McMann v. Richardson*, 397 U.S. 759, 771 (1970). Prior to the entry of their pleas, the defendants in *McMann* were fully aware of the circumstances grounding the involuntary nature of the confessions. Because the conduct of counsel was within the range of competency, this Court deemed defendants' pleas of guilty to be knowing and voluntary. *Id.* at 774. *See also Parker v. North Carolina*, 397 U.S. 790 (1970) (holding that defendant's statements to his counsel indicating that his confession had not been coerced, despite defendant's knowledge of the underlying circumstances, essentially precluded defendant from collaterally attacking his guilty plea).

In *Tollett*, this Court held that defendant, after pleading guilty with advice of counsel, could not later obtain release through federal habeas corpus by proving, without more, that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury. *See Tollett v. Henderson*, 411 U.S. 258, 269 (1973). The Court noted that defendant had not waived the argument because neither he nor his attorney knew of the racial discrimination prior to entering the plea of guilty. *Id.* at 266. This Court based its holding, at least in part, on that defendant had "solemnly admitted in open court that he is in fact guilty of the offense with which he is charged." *Id.* at 267. This Court also appears to have based its holding on that the error concerned a grand jury proceeding.

In the case at bar, Respondent submits that the decision of the Appellate Court of Illinois is sound and consistent with the rationale expressed in these cases. First, *Brady* and *Tollett* hold essentially that the solemn admission of guilt equates to the factual admission to the court by the defendant of "I did it; I, in fact, committed the crime." As noted by the Appellate Court of Illinois, such an admission did not occur in Respondent's case.

Second, because the State suppressed evidence that the State was required to disclose to him under *Brady v. Maryland*, 373 U.S. 83 (1963), Respondent and his counsel were foreclosed from the opportunity to intelligently assess the State's evidence. Thus, following the rationale in *McMann*, Respondent's *Alford* plea was not knowing and voluntary. Any holding to the contrary would only encourage law enforcement authorities to suppress evidence before the guilty plea.

Third, in all of these cases except *Tollett*, the defendants knew of the underlying facts regarding the alleged error prior to entering their guilty pleas. Respondent had no such awareness.

Fourth, unlike *Tollett*, the error in this case did not concern the grand jury process but concerned the evidence of guilt presented at the *Alford* plea hearing. Fifth, the facts of this case,

in light of the involuntary nature of Respondent's admissions, render the State's evidence at the *Alford* plea hearing unreliable as to Respondent's guilt.

In sum, the decision of the Appellate Court of Illinois to permit Respondent to collaterally attack his plea is based on several factors. Each of these factors – lack of solemn admission in court that Respondent committed the crimes, essentially the unreliability of the State's evidence of guilt (the tainted confession), and the lack of knowledge of Respondent and his counsel of the scheme – is part of the Illinois Appellate Court's holding, which is consistent with this Court's precedents.

C. The Decision of the Appellate Court of Illinois Will Not Have Far-Reaching and Deleterious Effects.

Contrary to Petitioner's argument, the decision of the Appellate Court of Illinois will not have far-reaching and deleterious effects. First, the holding of the Illinois Court is very limited. Such collateral attacks of guilty pleas are limited to *Alford* plea situations, where the State's factual basis for the plea primarily concerns a confession, and where facts unknown at the time of the defendant's plea suggest coercion. Second, the State and the defendants are able to negotiate such *Alford* plea agreements. Like any negotiated agreement, the State obtains the benefits of the bargain. Third, even if the plea is not negotiated, the sentence can reflect that the defendant has not admitted committing the charged misconduct.

CONCLUSION

Because of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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